DEREK VICTOR CAWTON & ANOR v. FATIMAH MOHD HASHIM

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: C-02-971-04-2013]
25 FEBRUARY 2015

LAND LAW: *Malay reservations – Dealings in reservation land – Land leased to non-Malays – Whether Malay Reserve Land could be leased to non-Malay – Whether lease contravened Malay Reservation Enactment (Cap. 142), ss. 2,5 8 and 19*

CIVIL PROCEDURE: *Estoppel – Estoppel by conduct – Whether respondent estopped from denying appellants' possessory right – Doctrine of estoppel – Whether a flexible principle – Whether ignorance of law a defence or excuse*

The respondent was the registered owner of a parcel of Malay Reservation land ('the said land'). The respondent and her late husband ('Jack Choo') operated a resort on the said land. A part of the said land ('the disputed land') was the subject matter of the litigation and the appeal between the parties. In 2003, a British and Swiss couple ('the appellants') and the respondent entered into a lease agreement over the disputed land for 40 years with an agreed amount of rental. However, the respondent issued a notice to quit to the appellants in 2008. When the appellants refused to quit and deliver vacant possession of the disputed land to the respondent, the respondent commenced civil proceedings ('proceedings') against the appellant. The main issue in the proceedings was whether the lease between the parties contravened the Malay Reservation Enactment (Cap. 142) ('the Enactment'). In defence, the appellants submitted that the lease agreement did not amount to a dealing contrary to the provisions of the Enactment as it granted only limited possessory/occupational rights to the appellants. In support, it was submitted that possession would ultimately return to the respondent and that the respondent was at liberty to deal with the disputed land. The High Court allowed the respondent's claim. Aggrieved, the appellants appealed against part of the High Court's decision. In its grounds of appeal, the appellants contended, *inter alia,* that (i) the agreement between the parties was not one which fell within the definition of lease in s. 5 of the National Land Code ('NLC') imported by way of s. 2 of the Enactment; (ii) the rooms/chalets of the resort operated by the respondent were rented regularly to foreigners and local non-Malay guests, thus if the agreement between the parties was deemed to be in breach of the provisions of the Enactment, the same would apply to the renting of rooms/chalets at the resort, resulting in the Malay Reservation land being of very limited value to a Malay owner. The

A appellants quoted the case of *Boustead Trading Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd ('Boustead')* that "the time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case ... estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve
B justice. Indeed the circumstances in which the doctrine may operate are endless". Further, the appellants' submitted that in *WJ Alan & Co Ltd v. EL Nasr Export & Import Co ('WJ Alan')* it was held that "If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that
C belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so". Thus, it was argued that the respondent be estopped from denying the appellants their limited possessory right. To complete the submissions, the appellants contended that they were foreigners who were at the material time totally unaware and was not informed of the status of the disputed land
D as Malay Reservation land and the various prohibitions under the Enactment as well as its consequences.

Held (dismissing appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

E **(1)** It is a basic principle of the English common law that ignorance of the law is not a defence or excuse be it for locals or foreigners. In this case, the appellants' undoing is their doing. (para 15)

(2) Section 8(1) of the Enactment provided that no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not
F being a Malay, and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles. In the light of the very clear prohibition, reliance upon *WJ Alan* was misplaced because the restriction affecting the appellants was by the Malay Reservations Enactment, a statute law
G applicable to all and whereas in *WJ Alan* it concerned the legal rights *inter se* between the parties. (paras 16 & 17)

(3) The words "the time has come" in *Boustead* could not possibly mean that the court could legislate or make law contradicting statute law, or that the equitable doctrine of estoppel could be applied at will. That would
H lead to anarchy. The doctrine of estoppel was limited to achieving justice according to law. No rule of equity was to be allowed to stand in the face of the objective of statute law. (para 17)

(4) The submissions that the lease was not within the definition of lease in s. 5 of the NLC, disregarded the fact that the appellants, by this appeal,
I were seeking to hold on to possession of the disputed property for the term of 40 years. Notwithstanding whatever label used, the substance of the appellants' appeal remained that the appellants, who were non-

Malays, sought to keep possession for their own use for 40 years the disputed land, which was part of a parcel of Malay Reservation land. (para 18)

(5) While s. 8(1) of the Enactment provided that no memorandum of transfer, charge or lease in contravention of this section should be capable of registration, the section prohibited any Malay holding not only from being transferred, charged, or leased but also from being otherwise disposed of to any person not being a Malay. Section 19(1) of the Enactment further provided that "all dealings or disposals whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of this Enactment shall be null and void ..." The terms "... or otherwise disposed of ..." and "... all attempts to deal in or dispose ..." extend the prohibition beyond transfers, charges and leases, and therefore prohibited and rendered null and void leases not capable of registration. (para 19)

(6) Leasing out of a possessory right for 40 years effectively placed the disputed land in non-Malay hands for that period, while in the terms of rental of chalets and rooms for guests, Malays as well as non-Malays for short terms, maintained the resort in Malay hands. In the circumstances, the application of the Enactment was clear and no doctrine of equity may stand against it. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Responden merupakan pemilik berdaftar sebidang tanah Rizab Melayu ('tanah tersebut'). Responden dan mendiang suaminya ('Jack Choo') telah mengendalikan sebuah resort di atas tanah tersebut. Sebahagian daripada tanah tersebut ('tanah yang dipertikaikan') adalah hal perkara tindakan undang-undang dan rayuan antara pihak-pihak. Pada tahun 2003, sepasang warganegara British dan Switzerland ('perayu-perayu') dan responden telah memasuki satu perjanjian pajakan ke atas tanah yang dipertikaikan selama 40 tahun dengan sejumlah sewa yang dipersetujui. Akan tetapi, responden telah mengeluarkan satu notis untuk mengosongkan tanah kepada perayu-perayu pada tahun 2008. Apabila perayu-perayu enggan mengosongkan tanah dan menyerahkan milikan kosong, responden telah memulakan prosiding sivil ('prosiding') terhadap perayu-perayu. Isu utama dalam prosiding adalah sama ada pajakan antara pihak-pihak telah melanggar peruntukan Enakmen Rizab Melayu (Cap. 142) ('Enakmen'). Dalam pembelaan, perayu-perayu menghujahkan bahawa perjanjian pajakan tersebut tidak terjumlah kepada urusan bertentangan dengan peruntukan-peruntukan Enakmen kerana ia hanya memberikan hak pemilikan/penghunian terhad. Dalam menyokong pembelaan, adalah dihujahkan oleh perayu-perayu bahawa milikan akan dipulangkan kepada responden dan responden bebas untuk berurusan dengan tanah yang dipertikaikan. Mahkamah Tinggi telah membenarkan tuntutan

responden. Terkilan, perayu-perayu merayu terhadap sebahagian keputusan Mahkamah Tinggi. Dalam alasan rayuan, perayu-perayu menghujahkan, antara lain, bahawa (i) perjanjian antara pihak-pihak bukan suatu yang terjumlah ke dalam takrif pajakan s. 5 Kanun Tanah Negara ('KTN') yang diimport melalui s. 2 Enakmen; (ii) bilik/chalet resort yang dikendalikan oleh responden telah disewakan kepada orang asing dan tetamu bukan Melayu tempatan, dengan itu, sekiranya perjanjian antara pihak-pihak disifatkan sebagai melanggar peruntukan Enakmen, maka yang sama akan berlaku untuk penyewaan bilik/chalet di resort, menyebabkan nilai tanah Rizab Melayu sangat terhad kepada pemilik Melayu. Perayu memetik perenggan dari kes *Boustead Trading Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd ('Boustead')* bahawa "masanya telah tiba untuk mahkamah ini mengakui bahawa doktrin estopel adalah prinsip fleksibel di mana keadilan dilakukan mengikut hal keadaan kes itu ... estopel adalah doktrin utiliti luas dan boleh terpakai dalam pelbagai fakta untuk mencapai keadilan. Sesungguhnya keadaan di mana doktrin boleh beroperasi adalah tidak berkesudahan." Di samping itu, perayu-perayu menghujahkan bahawa kes *WJ Alan & Co Ltd v. EL Nasr Eksport & Import Co ('WJ Alan')* memutuskan "jika satu pihak dengan tindakannya membawa satu lagi untuk mempercayai bahawa hak-hak ketat yang berbangkit di bawah kontrak tidak akan ditegaskan, dengan niat bahawa yang lain akan bertindak atas kepercayaan tersebut, dan bertindak di atasnya, maka pihak pertama tidak akan kemudiannya dibenarkan untuk menegaskan hak undang-undang yang ketat dan akan menjadi tidak saksama untuk berbuat demikian." Oleh itu, dihujahkan bahawa responden diestop daripada menafikan hak milik terhad perayu-perayu. Untuk melengkapkan hujahan, perayu-perayu menegaskan bahawa mereka adalah warga asing pada masa material dan tidak menyedari dan tidak dimaklumkan mengenai status tanah yang dipertikaikan sebagai tanah Rizab Melayu dan pelbagai larangan di bawah Enakmen dan juga akibatnya.

Diputuskan (menolak rayuan dengan kos):

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Adalah prinsip asas undang-undang Inggeris bahawa kejahilan undang-undang bukanlah satu pembelaan atau alasan bagi penduduk tempatan atau warga asing. Dalam kes ini, ketinggalan tersebut adalah atas perbuatan mereka sendiri.

(2) Seksyen 8(1) Enakmen memperuntukkan syarat bahawa tiada pegangan Melayu boleh dipindahkan, dipajakkan atau digadaikan atau dilupuskan kepada mana-mana orang bukan Melayu, dan tiada memorandum pindah milik, gadaian atau pajakan yang melanggar seksyen ini boleh didaftarkan di mana-mana Pejabat Tanah atau Pejabat Pendaftar Hakmilik. Dengan mengambil kira larangan yang sangat jelas, kebergantungan kepada kes *WJ Alan* adalah salah kerana sekatan yang

menjejaskan perayu-perayu adalah berkenaan Enakmen Rizab Melayu, undang-undang yang terpakai bagi semua manakala kes *WJ Alan* adalah berkenaan hak undang-undang di antara pihak-pihak.

(3) Perkataan "masanya telah tiba" dalam kes *Boustead* tidak mungkin bermakna mahkamah boleh menggubal undang-undang atau membuat undang-undang bertentangan dengan undang-undang statut, atau bahawa doktrin estopel ekuiti boleh digunakan sesuka hati. Ini akan membawa kepada keadaan huru-hara. Doktrin estopel terhad kepada mencapai keadilan mengikut undang-undang. Tiada peraturan ekuiti dibenarkan untuk menghalang objektif undang-undang statut.

(4) Hujahan bahawa pajakan tersebut tidak terjatuh ke dalam takrif pajakan s. 5 KTN, mengabaikan fakta bahawa perayu-perayu, melalui rayuan ini, telah berusaha untuk berpegang kepada milikan harta yang dipertikaikan selama tempoh 40 tahun. Walau apa pun sahaja label yang digunakan, intipati rayuan perayu adalah bahawa perayu-perayu, yang bukan orang Melayu, berusaha untuk berpegang, untuk kegunaan sendiri, selama 40 tahun tanah yang dipertikaikan, yang merupakan sebahagian daripada tanah Rizab Melayu.

(5) Sementara s. 8(1) Enakmen mensyaratkan bahawa tiada memorandum pindah milik, gadaian atau pajakan yang melanggar seksyen ini boleh didaftarkan, seksyen tersebut juga melarang mana-mana pegangan Melayu bukan sahaja daripada dipindahkan, digadai, atau dipajak tetapi juga dilupuskan kepada mana-mana orang bukan Melayu. Seksyen 19(1) Enakmen mensyaratkan selanjutnya bahawa "semua urusan atau pelupusan dan segala percubaan untuk berurusan atau melupuskan mana-mana pegangan Melayu bertentangan dengan peruntukan-peruntukan Enakmen ini adalah terbatal dan tidak sah" ... Terma "... atau selainnya dilupuskan ..." dan "... semua percubaan untuk berurusan atau melupuskan ..." melanjutkan larangan melebihi pemindahan, gadaian dan pajakan, dan oleh itu melarang dan menjadikan pajakan terbatal dan tidak sah untuk didaftarkan.

(6) Pajakan hak milikan selama 40 tahun telah dengan berkesan meletakkan tanah yang dipertikaikan di tangan orang bukan Melayu untuk tempoh tersebut, manakala dalam terma penyewaan chalet dan bilik-bilik untuk para tetamu, Melayu dan bukan Melayu untuk jangka pendek, mengekalkan resort di tangan orang Melayu. Dalam keadaan ini pemakaian Enakmen adalah jelas dan tidak ada doktrin ekuiti yang boleh menghalangnya.

Case(s) referred to:

Bariam Singh v. Pegawai Pentadbir Pesaka Malaysia (Administrator Of Estate Of Datuk Foo Say Lee) [1980] 1 LNS 215 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(dist)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Idris Hj Mohamed Amin v. Ng Ah Siew [1935] 1 LNS 15 HC ***(refd)***

Robert Lee & Anor v. Wong Ah Yap & Anor [2007] 4 CLJ 1 FC ***(foll)***

WJ Alan & Co Ltd v. EL Nasr Export & Import Co [1972] 2 QB 189 ***(dist)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 17A
Malay Reservations Enactment, ss. 2, 8(1), 19(1)
National Land Code, s. 5

For the appellants - Bastian Vendargon (Gene Vendargon with him); M/s Bastian Vendargon

For the respondent - Mura Raju; M/s Mura Raju & Co

[Appeal from High Court, Kuantan; Civil Suit No: 22-66-2009]

Reported by Sandra Gabriel

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellants-defendants Derek Victor Cawton and Patricia Berangere Cawton-Graf ('the appellants') who are a British and Swiss couple, appealed against part of the decision of the High Court at Kuantan after a full trial, which allowed the respondent-plaintiff's ('the respondent') claim as prayed for in the statement of claim except for para. 10(iv) therein. There is no appeal by the respondent against the grant of an order of restitution as set out in the amended statement of defence and counterclaim.

[2] The respondent is the registered owner of a parcel of Malay reservation land known as H.S. (M) 2804 P.T 9012, Mukim Penor, Daerah Kuantan, Pahang Darul Makmur ('the said land'). The respondent and her late husband Jack Choo @ Fariq Choo operated a resort facility on the said land. A part of the said land ('the disputed land') is the subject matter of the litigation and the appeal between the parties.

[3] Sometime in 2003, the appellants and the respondent entered into a 'lease agreement' over the disputed land, comprising an 11,000 sq feet portion of the said land commencing 1 March 2003 for 40 years until 1 March 2042, with rental initially at RM2,500 per annum for the first five years, increasing every five years and ending with rental at RM7,200 per annum for the final five year period ending on 1 March 2042.

[4] The said Jack Choo having died sometime in May 2005, the respondent married one Anthony Syddall.

[5] A cheque in payment of the rental for 1 March 2007 to 1 March 2008 by the appellants was returned by the said Anthony Syddall sometime in June 2007. A fresh cheque issued subsequently was also returned. A notice to the appellants to quit was issued by the respondent through her solicitors in 2008. When the appellants refused to quit and deliver vacant possession, the respondent commenced civil proceedings. The appellants filed a defence and a counterclaim.

The Issue

[6] The main issue is whether the 'lease' between the parties contravened the Malay Reservations Enactment (Cap 142) ('the Enactment').

The Submission For The Appellants

[7] It was submitted for the appellants that the 'lease agreement' did not amount to a dealing contrary to the provisions of the Enactment as it granted "only limited possessory/occupational rights". In support, it was submitted that possession "will ultimately return to the respondent in accordance with the terms and conditions of the agreement" and it is stipulated that the respondent is at liberty to deal with the disputed land at any time by selling the same, in which event, the appellants must return possession to the respondent.

[8] Relying on *Idris Hj Mohamed Amin v. Ng Ah Siew* [1935] 1 LNS 15; [1935] 1 MLJ 257 that the obvious intention of the Enactment was to secure land comprised in Malay reservations for Malays only and *Bariam Singh v. Pegawai Pentadbir Pesaka Malaysia (Administrator Of Estate Of Datuk Foo Say Lee)* [1980] 1 LNS 215; [1983] 1 MLJ 232 that "the aim of the law is that the land should not fall into the hands of a non-Malay ...", and that since by s. 17A of the Interpretation Acts 1948 and 1967 the courts should favour a purposive approach (see *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; [2002] 2 MLJ 11), it was submitted that the High Court erred in relying on the form or label of the agreement hand drafted by a layman Jack Choo, for if the agreement is scrutinised, the numerous restrictions imposed on the appellants demonstrate that the agreement does not grant any interest in the title to the land in question, but merely affords the appellants a limited personal occupational right to a portion of the land.

[9] Counsel referred to *Robert Lee & Anor v. Wong Ah Yap & Anor* [2007] 4 CLJ 1; [2007] 4 MLJ 393 FC and submitted in that case the Federal Court held that the Malay Reservations Enactment was created with 'a definitive objective', and went on to state that "no rules of equity shall be applied that would defeat such objective" but the agreement between the parties in the present case, as described above, does not defeat that objective.

[10] It was further submitted:

(a) The right to possession is granted exclusively to the appellants and is not transferable.

(b) If the respondent decides at anytime to sell her land, the appellants are compelled to deliver back possession to the respondent in return for the basic cost of construction of the house thereon only.

(c) The appellants cannot rent/lease any part of the disputed land (or the house thereon) to another in return for profit and/or use the house for any commercial purpose whatsoever.

(d) The agreement between the parties is not one which falls within the definition of 'lease' in s. 5 of the National Land Code imported by way of s. 2 of the Enactment.

(e) That the rooms/chalets of the resort operated by the respondent are let regularly to foreigners and local non-Malay guests, and if the agreement between the parties in the present case is deemed to be in breach of the provisions of the Enactment, the same will apply to the letting of rooms/chalets at the resort, resulting in Malay reservation land being of very limited value to a Malay owner.

[11] Counsel quoted *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 FC that "The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless".

[12] The submission proceeded on to *WJ Alan & Co Ltd v. EL Nasr Export & Import Co* [1972] 2 QB 189 that "If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so".

[13] It was submitted that the respondent be estopped from denying the appellants their limited possessory right.

[14] To complete the submissions, it was submitted that the appellants are foreigners who were at the material time totally unaware and was not informed of the status of the disputed land as Malay reservation land and the various prohibitions under the Enactment as well as its consequences.

Reasoning And Conclusion

[15] It is a basic principle of the English common law inherited here that ignorance of the law is not a defence or excuse be it for locals or foreigners, and of equity that the party seeking equity had done due diligence. In this case, the appellants' undoing is their doing.

[16] Section 8(1) of the Enactment provides:

> Subject to the provisions of sub-section (ii) and of Sections 16 and 17 no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles.

[17] In the light of the very clear prohibition, reliance upon *WJ Alan & Co Ltd v. EL Nasr Export & Import Co (supra)* is misplaced because the restriction affecting the appellants is by the Malay Reservations Enactment, statute law applicable to all and whereas this case concerns the legal rights *inter se* between the parties. We also cautioned ourselves that the words "The time has come ..." in *Boustead Trading Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd (supra)* cannot possibly mean that the court can legislate or make law contradicting statute law, or that the equitable doctrine of estoppel can be applied at will. That would lead to anarchy. The doctrine of estoppel is limited to achieving justice according to law. Indeed in *Robert Lee & Anor v. Wong Ah Yap & Anor (supra)*, the Federal Court had made it abundantly clear that no rule of equity is to be allowed to stand in the face of the objective of statute law.

[18] Ample precedent, such as *Idris Haji Mohamed Amin v. Ng Ah Siew (supra)* and *Bariam Singh v. Pegawai Pentadbir Pesaka Malaysia (Administrator Of Estate Of Datuk Foo Say Lee) (supra)* cited in respect of the purpose of the Malay Reservations Enactment, speak of the intention of the Enactment to ensure that lands in Malay reservations remain for Malays, and not fall in the hands of non-Malays. The submissions that the right to possession granted to the appellants was limited, not transferable, to be returned if the respondent should sell or transfer the land, the lease is not within the definition of lease in s. 5 of the National Land Code, disregard the fact that the appellants, by this appeal, are seeking to hold on to possession of the disputed property for the agreed term of 40 years from 1 March 2003. Notwithstanding whatever label used, the substance of the appellants' appeal remains that the appellants, who are non-Malays, seek to keep possession for their own use for 40 years the disputed land, which is part of a parcel of Malay reservation land.

[19] We observe that while s. 8(1) of the Enactment provides that no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration, the section prohibits any Malay holding not

A only from being transferred, charged, or leased but also from being otherwise disposed of to any person not being a Malay. And s. 19(1) of the Enactment further provides that "all dealings or disposals whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of this Enactment shall be null and void ..." The terms "... or otherwise disposed B of ..." and "... all attempts to deal in or dispose ..." extend the prohibition beyond transfers, charges and leases, and therefore prohibits and renders null and void leases not capable of registration.

[20] The further argument that if the agreement between the appellants and the respondent is held to be in breach of the Enactment, then the renting out C of chalets and rooms in the resort portion of the respondent's land to foreigners and local non-Malays would also be in breach wholly overlooks the fact that the chalets and rooms are rented out on daily and short term basis, whilst the appellants seek to maintain a possessory right for 40 years from 1 March 2003. Leasing out of a possessory right for 40 years effectively D places the disputed land in non-Malay hands for that period, while the terms of rental of chalets and rooms for guests, Malays as well as non-Malays for short terms, maintains the resort in Malay hands. In the circumstances, the application of the Enactment is clear and, following *Robert Lee B Robert Seet & Anor v. Wong Ah Yap & Anor (supra)*, no doctrine of equity may stand E against it.

[21] For the foregoing reasons, we find no merit in the appeal. We dismiss the appeal with costs in the sum of RM10,000 as agreed to be paid to the respondent, and deposit to respondent to account of costs as agreed by parties.

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